STATE OF MICHIGAN

IN THE SUPREME COURT

MICHAEL BANKS,

Plaintiff-Appellant,

vs

EXXONMOBIL CORPORATION, d/b/a/ WIXOM MOBIL ON THE RUN, a New York corporation; and ROBERT PEMBE,

Defendants-Appellees,

and

DEBRA SALISBURY,

Defendant.

Supreme Court No. 131036

Court of Appeals No. 257902

Oakland County Circuit Court No. 03-049526-NO

131036

DEFENDANTS-APPELLEES' SUPPLEMENTAL BRIEF
IN RESPONSE TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE

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STATEMENT OF QUESTIONS PRESENTED

I. Did the lower courts err in granting Defendants summary disposition on the issue of whether Defendants knew or should have known of the dangerous condition of the gasoline pump?

Defendants – Appellees say "NO".

Plaintiff – Appellant says "YES".

II. Should the Oakland County Circuit Court's ruling that the jury would be instructed that it could infer that the missing videotape would be adverse to the Defendants play any role in the determination whether summary disposition is warranted under MCR 2.116(C)(10)?

Defendants – Appellees say "NO".

Plaintiff – Appellants say "YES".

III. If the adverse inference is considered in the determination of whether summary disposition is warranted under MCR 2.116(C)(10), would the Defendants have nonetheless been entitled to summary disposition?

Defendants – Appellees say "YES".

Plaintiff – Appellants say "NO".

I. INTRODUCTION

The Court has requested that the parties provide oral argument and supplemental briefing on two specific issues with regard to Plaintiff's Application for Leave to Appeal: (1) whether the lower courts erred in ruling that the defendants are entitled to summary disposition on the issue of whether the defendants knew or should have known of the dangerous condition of the gasoline pump; and (2) whether the Oakland Circuit Court's ruling that the jury would be instructed that it could infer that the missing videotape would be adverse to the defendants should play any role in the determination of whether summary disposition is warranted under MCR 2.116(C)(10) and, if so, how the adverse inference affects the summary disposition proceedings. See 9/15/06 Order, Ex. A.

Defendants will address these two issues in reverse order. First, the circuit court's ruling that the jury would be instructed that it could infer the missing videotape would be adverse to the Defendants should play no role in determining whether a genuine issue of material fact exists in this case. The inference is permissive, and the jury would not be required to make the inference if it so decided. Thus, it is purely speculative that the jury would actually make the inference, and courts cannot rely on such speculation when determining whether a genuine issue of material fact exists to defeat summary disposition.

To apply the inference, a court must determine that the jury could reasonably apply the inference in light of the evidence presented. Thus, some circumstantial evidence corroborating the inference must exist before the court could conclude that the inference can be reasonably applied. Here, Plaintiff has presented no evidence that would corroborate the adverse inference he wants the court to draw from the missing videotape. Indeed, all of the evidence presented actually contradicts the inference Plaintiff seeks. Accordingly, the inference should not be

considered by the Court when determining whether a genuine issue of material facts exists sufficient to defeat summary disposition.

Second, with or without applying the adverse inference, Plaintiff has not submitted sufficient evidence to create a genuine issue of material fact that the Defendants had actual or constructive notice of the damage to the gasoline pump. This is not a borderline case where the adverse inference, if applied, may add enough evidence to create an issue of material fact. Here, even applying the inference, Plaintiff has completely failed to present any evidence that would take this case out of the realm of conjecture and speculation and make it appropriate for summary disposition. Thus, the Oakland County Circuit Court properly granted Defendants summary disposition and the Court of Appeals properly affirmed the circuit court's ruling. Accordingly, there is no need for this Court to grant Leave to review the Court of Appeals' decision.

II. FACTS

Defendants rely on all of the facts set forth in their original Response to Plaintiff-Appellant's Application for Leave. For the Court's convenience, Defendants also reattach as exhibits the documents in which they refer in support of the supplemental arguments made herein.

III. ARGUMENT

A. An Adverse Inference May Be Appropriately Considered on Summary Disposition Under Certain Circumstances, However Here The Inference Remains Too Speculative To Be Applied

The Court has specifically asked the parties to further address whether the Oakland County Circuit Court's ruling, that the jury would be instructed that it could infer the missing videotape would be adverse to the defendants, should play any role in the determination of

whether summary disposition is warranted under MCR 2.116(C)(10), and, if so, how the adverse inference affects the summary disposition proceedings. See 9/15/2006 Order, Ex. A. In this case, the adverse inference should not play a role in the determination of whether summary disposition is appropriate, and does not affect the proceedings or the prior rulings of the circuit court and the Court of Appeals in any way.

As a general proposition, in some cases a court could consider an adverse inference awarded as a spoliation sanction, in addition to the substantive proof offered by the non-moving party, when determining whether summary disposition under MCR 2.116(C)(10) is appropriate. An adverse inference, however, is not a presumption, sufficient on its own to defeat summary disposition. An adverse inference is also not substantive evidence which can independently support a plaintiff's claims. Instead, an adverse inference is further weight in addition to the substantive evidence presented by the party in support of his claim. An adverse inference is merely a permissive inference, and a jury does not have to consider it if it so chooses. Without other substantive evidence supporting a party's claim, and without evidence corroborating the adverse inference, the inference is completely speculative, and cannot be considered by the Court.

As such, to properly apply the adverse inference at the summary disposition stage, the inference must be supported by enough corroborating evidence that the court could find a reasonable jury may apply the inference. In those cases, if the substantive evidence presented by the non-moving party is on the cusp of creating a genuine issue of material fact, a court may also consider the adverse inference along with the substantive evidence presented to determine whether summary disposition is appropriate.

The present matter, however, is not one of those cases. The adverse inference instruction allowed by the Oakland County Circuit Court as a spoliation sanction should not play a role in the Court's decision to grant or deny summary disposition on Plaintiff's claims, because none of the evidence presented corroborates the inference that the videotape would have shown something adverse to the Defendants. In fact, the evidence presented actually contradicts the inference that the videotape would have been adverse to the Defendants. Accordingly, the inference should not be applied when determining summary disposition of Plaintiff's claims.

1. Plaintiff is not entitled to more than the adverse inference sanction he was awarded by the circuit court.

Plaintiff argues a hard and fast rule that the spoliation sanction he was awarded must be imposed and considered at the summary disposition stage of these proceedings, and alone can defeat summary disposition. Plaintiff, however, is attempting to gain more from the circuit court's spoliation sanction than he is entitled. The adverse inference instruction that the circuit court awarded Plaintiff, M Civ JI 6.01[1], allows a jury to infer, if it chooses, that the videotape

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[1] M Civ J1 6.01 Failure to Produce Evidence or a Witness

a. (The [plaintiff / defendant] in this case has not offered [the testimony of <name> / <Identify exhibit.>]. As this evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her], and no reasonable excuse for the [plaintiff's / defendant's] failure to produce the evidence was given, you may infer that the evidence would have been adverse to the [plaintiff / defendant].)
b. (The [plaintiff / defendant] in this case has not offered [the testimony of <name> / <Identify exhibit.>]. As no reasonable excuse for the [plaintiff's / defendant's] failure to produce this evidence was given, you may infer that the evidence would have been adverse to the [plaintiff / defendant], if you believe that the evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her].)
c. (The [plaintiff / defendant] in this case has not offered [the testimony of <name> / <Identify exhibit.>]. As this evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her], you may infer that the evidence would have been adverse to the [plaintiff / defendant], if you believe that no reasonable excuse for [plaintiff's / defendant's] failure to produce the evidence has been shown.)

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Defendants failed to produce may have been adverse to the Defendants. The adverse inference, however, is merely permissive. Brenner v Kolk, 226 Mich App 149, 155, 573 NW2d 65 (1998). The jury is not obligated to make such an inference against the Defendants and may not actually apply the inference at trial. Id. Where it is total speculation whether the jury will actually apply the adverse inference at trial, it is inappropriate that the court on summary disposition be required to apply the inference. Schwaderer v Huron-Clinton Metropolitan Authority, 329 Mich 258, 272; 45 NW2d 279 (1951).

What the Plaintiff appears to believe he is entitled is far more than the permissive adverse inference instruction that he was awarded by the circuit court – Plaintiff appears to be asking this Court to consider a rebuttable *presumption* that the videotape would have been adverse to the Defendants. This is evident from his request that the adverse inference must preclude Defendants entirely from pursuing their summary disposition motion. See Application at 24. The inference that Plaintiff was awarded,[2] however, does not operate like a presumption. Indeed, an adverse inference has far less impact than a presumption at a summary disposition proceeding.

The Court has previously discussed the distinction between the effect of a presumption and a permissible inference in Widmayer v Leonard, 422 Mich 280, 289, 373 NW2d 538 (1985). "[T]he function of a presumption is solely to place the burden of producing evidence on the

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d. (The [plaintiff / defendant] in this case has not offered [the testimony of <name> / <Identify exhibit.>]. You may infer that this evidence would have been adverse to the [plaintiff / defendant] if you believe that the evidence was under the control of the [plaintiff / defendant] and could have been produced by [him / her], and no reasonable excuse for [plaintiff's / defendant's] failure to produce the evidence has been shown.)

[2] Under Michigan law, an adverse presumption only arises when the complaining party can establish intentional destruction of the evidence. Ward v Consolidated Rail Corp, 472 Mich 77, 84-85, 693 NW2d 366 (2005). The circuit court awarded only an adverse inference instruction as a spoliation sanction, not a presumption, and Plaintiff has not challenged the circuit court's sanction against Defendants on appeal.

opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption." Id. "Almost all presumptions are made up of permissible inferences. Thus, while the presumption may be overcome by evidence introduced, the inference itself remains and may provide evidence sufficient to persuade the trier of fact even though the rebutting evidence is introduced." Id.

The Court of Appeals further articulated this Court's distinction in Widmayer of the application of a presumption versus a permissible inference: "In other words, an unrebutted presumption would *require* the trier of fact to conclude that the unproduced evidence would have been adverse. [M Civ JI] 6.01 merely *permits* an inference that it would have been adverse; the jury is free to decide for itself." Lagalo v Allied Corp, 233 Mich App 514, 521, 592 NW2d 786 (1999) (emphasis in original) *overruled on other grounds by* Kelly v Builders Square Inc, 465 Mich 29, 632 NW2d 912 (2001).

It is clear from this analysis that an inference is narrower, and has less impact than a presumption. A presumption is a conclusion that the trier of fact may draw, id, but an inference is a deduction that must generally be based on the evidence presented. See Weber v Bergwall, 328 Mich 421, 426, 43 NW2d 915 (1950); Meli v General Motors Corp, 37 Mich App 514, 518, 195 NW2d 85 (1972).

Thus, if the circuit court had awarded Plaintiff a ***presumption*** that the videotape contained evidence adverse to the Defendants, he would have been able to rely on that presumption to avoid summary disposition[3] despite the uncontroverted evidence submitted by

[3]The standard of review required for awarding a party directed verdict is the same as that required for summary disposition; both require the court to view the evidence presented in a light most favorable to the nonmoving party to determine whether a factual question exists. Both a
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Defendants in support of their motion. See Widmayer, 422 Mich at 289. The presumption alone would have pushed Plaintiff over the evidentiary hurdle required to create a genuine issue of material fact. Plaintiff was not awarded an adverse ***presumption***, however, and accordingly, cannot automatically avoid summary disposition as he claims he should.

2. The adverse inference is not itself substantive evidence sufficient to defeat summary disposition.

An inference is not itself evidence, but instead a deduction reasonably made from the substantive evidence presented in support of a plaintiff's claim. See Weber, 328 Mich at 426; see also Meli, 37 Mich App at 518. Here, because Defendants misplaced the videotape evidence, the circuit court held that the jury could, if it chose, deduce that the missing evidence would have been adverse to the Defendants. This one permissive inference that the trier of fact could draw, however, is not enough to create a genuine issue of material fact. It is, alone, too speculative for the court to rely on when determining a motion for summary disposition.

In evaluating a motion for summary disposition under MCR 2.116(C)(10), a trial court must consider only substantively admissible evidence contained in the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties. Although the evidence must be considered in the light most favorable to the non-moving party, Maiden v Rozwood, 461 Mich 109, 120-121, 597 NW2d 817 (1999), that party has the burden of showing that a genuine issue of material fact exists. Tope v Hower, 179 Mich App 91, 98, 445 NW2d 452 (1989).

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directed verdict motion and a summary disposition motion should be denied if reasonable minds could differ with regard to whether the plaintiff has met the burden of proof. Compare Maiden v Rozwood, 461 Mich 109, 120-121, 597 NW2d 817 (1999) (summary disposition) and Oakland Hills Development Corp v Lueders Drainage Dist, 212 Mich App 284, 289, 537 NW2d 258 (1995)(directed verdict).

To meet this burden, the opposing party cannot rely on mere allegations or denials, but must set forth specific facts showing that there is a triable issue. Department of Social Services v Casualty Ins Co, 177 Mich App 440, 445, 443 NW2d 420 (1989). A mere possibility that the claim might be supported by evidence produced at trial is insufficient to successfully oppose a motion under MCR 2.116(C)(10). Maiden v Rozwood, 461 Mich 109 at 121.

Although from Defendants' research it does not appear that the Court has previously addressed whether an adverse inference should be applied in summary disposition proceedings, courts in other jurisdictions have addressed the issue, and the Court may find their decisions persuasive in this case. For instance, the Maryland Court of Appeals has stated that although suppression of evidence by a party leads to an inference that this evidence would be unfavorable to him, "it is well settled that this inference does not amount to substantive proof and cannot take the place of proof of a fact necessary to the other party's case." Maszczenski v Myers, 212 Md 346, 355, 129 A2d 109 (1957), attached at Ex. B.

Similarly, the District of Columbia Court of Appeals adopted the position of the Maszczenski court in holding an adverse inference is not substantive evidence, and further explained: "[T]he inference is merely another factor which may be given consideration by the trier of the fact when weighing the evidence and determining the credibility of witnesses." Battocchi v Washington Hospital Center, 581 A2d 759, 765 (1990)(internal quotations omitted), attached at Ex. C. That court further acknowledged a strong caution against "overuse of the missing [evidence] inference and the dangers inherent in creating evidence from nonevidence." Id.

The United States Court of Appeals for the Second Circuit has held that in certain borderline cases for summary judgment, an adverse inference in combination with "some (not

insubstantial) evidence" in support of the plaintiff's claims "may push a claim that might not otherwise survive summary judgment over the line." Byrnie v Town of Cromwell Board of Education, 243 F3d 93, 110 (2nd Cir 2001).

Thus, while the inference itself is not evidence suitable to create an issue of material fact, when coupled with other substantive evidence produced by the plaintiff, it could lend further weight to that evidence. These cases are not at odds with Michigan law. It is apparent that the Michigan courts have also distinguished an inference from substantive evidence. See Weber, 328 Mich at 426; see also Meli, 37 Mich App at 518. Further, one cannot dispute Michigan's requirement that a party opposing summary disposition must affirmatively set forth substantive evidence and specific facts to support his claims. See Maiden, 461 Mich at 120; Department of Social Services, 177 Mich App at 445. Thus, while the adverse inference itself cannot be used to defeat summary disposition, it appears that it may, under appropriate circumstances, be considered in conjunction with other substantive evidence when determining whether a genuine issue of fact exists.

3. The Court should not apply the adverse inference at summary disposition where there is no corroborating evidence in support of the inference.

The troubling fact remains, however, that an adverse inference is permissive, and it is completely speculative whether the trier of fact would actually apply the inference in Plaintiff's favor when faced with the lack of evidence produced by the Defendants. Brenner, 226 Mich App at 155. The Court has held that a court is not at liberty to indulge in speculative inferences. Schwaderer v Huron-Clinton Metropolitan Authority, 329 Mich 258, 272; 45 NW2d 279 (1951). Moreover, an inference loses force when contrary evidence is presented. King v Nicholson Transit Co, 329 Mich 586, 594; 46 NW2d 389 (1951). Accordingly, before applying the adverse

inference at the summary disposition stage, some analysis must be made to conclude that the trier of fact could reasonably draw the inference at trial. Again, other courts have addressed this concern, and the Court may find their analysis persuasive.

The Second Circuit Court of Appeals, in Byrnie, considered whether the evidence presented on summary judgment corroborated the adverse inference that could be drawn from the missing evidence, before applying the inference at summary disposition. Byrnie, 243 F3d at 110. In Byrnie, the plaintiff claimed he was unlawfully discriminated against by the defendant on the basis of age when he was passed over for a teaching position. Id at 100. In overturning the trial court's award of summary judgment on the plaintiff's disparate treatment claims, the court considered that an adverse inference could arise from the defendant's destruction of notes made by the defendants in the interviewing process. Id at 109-110. The court further said that "a party seeking an adverse inference may rely on circumstantial evidence to suggest the contents of destroyed evidence." Id. The plaintiff in Byrnie presented evidence that he was more qualified on paper than the applicant who received the teaching position, yet her application was somehow ranked higher. He further demonstrated that the defendant modified its justification for its hiring decision throughout the course of the dispute. Moreover, one of defendant's given justifications for not hiring the plaintiff seemed implausible, and defendant failed to adduce any evidence in support of that justification. Id. Based on this circumstantial evidence, the court found that a jury could reasonably find the destroyed documents contained unlawfully discriminatory reasons for not hiring the plaintiff. The court further held that, while the evidence presented by the plaintiff might not have been sufficient to defeat summary judgment, when coupled with the adverse inference that the jury could apply, it was sufficient to create an issue of fact for the jury. Id at 111.

The Maryland Court of Appeals applied this same analysis when determining that the defendant was entitled to a directed verdict despite the adverse inference arising from the defendant's destruction of evidence. Larsen v Romeo, 254 Md 220, 228, 255 A2d 387 (1969). In Larsen, the plaintiff was injured when he was rear-ended by the defendant tractor driver at an intersection. The defendant claimed that he was not negligent in causing the accident because he began breaking with enough distance to stop before hitting the plaintiff. Instead, the defendant claimed that the accident was caused because the air-breaks on his vehicle failed. After the accident, the defendant disposed of the air hose from his breaks. The plaintiff claimed on appeal that the trial court erred in granting a directed verdict in favor of the defendant, because the plaintiff was entitled to an adverse inference that whatever the air hose shown would have been adverse to the defendant. Id at 228. The court concluded that, despite the adverse inference, directed verdict in favor of the defendant was proper because the inference did not amount to substantive proof and could not take the place of proof of fact necessary to the other party's case. Id. Moreover, based on the evidence presented in support of plaintiff's claims, the only inference that could have been drawn was that the break hose did not reveal a defect. The court concluded that such an inference would not negate the defendant's testimony that the breaks failed nonetheless. Id.

These cases are instructive because they demonstrate what factors to consider when determining if and how an adverse inference should be considered at summary disposition. Based on the evidence presented by the non-moving party, the court should determine whether enough corroborating evidence in support of the inference exists to determine a jury could reasonably apply the adverse inference at trial. This is consistent with Michigan law, which holds that an inference may not be drawn contrary to the established facts. Ash v Great Lakes

Greyhound Lines, 337 Mich 362, 369; 60 NW2d 166 (1953). Only after this analysis is conducted, and it is determined that a reasonable jury could draw the inference based on established facts, may the court consider all the evidence produced and draw all reasonable inferences to determine whether the evidence is sufficient to defeat summary disposition. See Maiden, 461 Mich 109 at 121; Schwaderer, 329 Mich at 272.

4. Plaintiff cannot claim the benefit of the adverse inference at summary disposition because he has presented no evidence to support the inference.

Here, Plaintiff has failed to produce any evidence to support a finding that a jury could reasonably find the videotape contained information adverse to Defendants. Accordingly, Plaintiff can not use the adverse inference to aid in creating a genuine issue of reasonable fact to defeat summary disposition.

Although Plaintiff argues that the videotape could have shown any number of scenarios supporting his claim that Defendants had constructive notice of the damage to pump twelve, he has not presented sufficient facts to support the conclusion that a jury could reasonably draw the inference from those facts. Plaintiff fails to produce ***any*** evidence to support the inference that the videotape would have been adverse to Defendants. Indeed, the ***only*** evidence presented actually contradicts the adverse inference of constructive notice Plaintiff seeks from the missing video.

Debra Salsbury testified that she viewed the videotape after the incident and saw that pump twelve had been in constant use throughout the day. See Salsbury Deposition at 62, Ex. D. She also stated that, from the video, she could not see a vehicle strike the pump. Id at 105. She further stated that she could not see the damage to the pump. Id at 105. Ms. Salsbury testified that she did not see the actual incident involving the Plaintiff on the videotape. Id at 62-65. She stated that the view of the camera view was blocked by the height of the pump and nothing

specific could be seen with regard to the accident. Id. All of this evidence contradicts Plaintiff's argument for the adverse inference that the tape would have shown that the damage was of such a character, or existed for a considerable period of time, that Defendants should have been on notice of the damage.

Plaintiff cannot rebut the evidence presented by the Defendants which contradicts the inference Plaintiff wants the Court to draw. Plaintiff has presented no affirmative evidence regarding how or when the damage to the gasoline pump occurred. Plaintiff has provided no witnesses that actually observed the damage to the gasoline pump prior to Plaintiff's arrival at the gas station. There is no evidence that contradicts the Defendants' affirmative evidence that the videotape shows nothing that would have put the Defendants on constructive notice of the damage to the pump.

Plaintiff could have attempted to introduce evidence to contradict the Defendants' evidence. For instance, if Plaintiff had introduced evidence that the view of the video camera was not blocked by the height of the pump and should have shown the damage to the pump, it may have been enough evidence in support of the adverse inference to logically consider the inference. Or, if Plaintiff had introduced some evidence as to how or when the accident actually occurred, it may also have been enough evidence to allow the inference to be considered. Plaintiff, however, introduced no evidence in support of the inference he now states the Court is required to draw when determining summary disposition.

The one example scenario that Plaintiff offers the videotape may reveal only demonstrates this point further. Plaintiff argues that, theoretically, the tape "could have revealed

that after a car struck the pump[4] and damaged it, one of the defendants' agents working in the station's convenience store walked out of the store and examined the damage to the pump, but did nothing further to make that pump inoperable before Mr. Banks used it." See Application at 25. Plaintiff has not presented any evidence to support a finding that the tape could have shown this scenario. In fact, all of the evidence is quite to the contrary. Debra Salsbury testified that the store was very busy at the time Plaintiff arrived, and she and Mr. Poudel were both in the store operating the cash registers. Salsbury Deposition at 82, Ex D. The cash register receipts show that pumps were authorized and sales were made nearly every minute from inside the store. See Receipts, Ex E. It is very unlikely one of the Defendants' employees could have walked out of the store and viewed the pump. This evidence refutes the scenario Plaintiff claims the video could have shown.

Moreover, this scenario Plaintiff references would go to the issue of Defendants' actual notice of the damage to the pump. Defendants have been awarded summary disposition as to whether they had actual notice, and Plaintiff did not challenge that ruling on appeal. On summary disposition, Plaintiff presented no evidence that the Defendants had actual notice of the damage to the gasoline pump. Thus, it has already been established as a matter of law that insufficient evidence exists to support this particular scenario. No evidence exists to support any scenario which would allow an adverse inference to be reasonably drawn in this case.

Based on all of the evidence presented by Defendants contradicting the inference that the video would show something adverse to the Defendants, and the complete lack of evidence supporting the inference that the video would have shown something adverse to Defendants, no

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[4] No affirmative evidence has ever been presented to establish that the damage to the pump was caused by a car striking the pump. Ms. Salsbury testified that after viewing the type of damage the pump sustained, that she surmised a vehicle hit the pump. See Salsbury at 32, Ex. D. However, even this fact is speculative.

reasonable jury could draw that inference in this case. Accordingly, the adverse inference that Plaintiff seeks should not be considered to determine if Plaintiff has survived summary disposition.

B. The Lower Courts Did Not Err In Granting Summary Disposition As Plaintiff Has Not Established A Question of Fact That Defendants Had Constructive Notice of the Damage to the Gasoline Pump

With or without consideration of the adverse inference, Plaintiff has not established a question of material fact on the issue of whether Defendants had constructive notice of the damage to the gasoline pump that injured Plaintiff. This is not the type of borderline case discussed in Byrnie, where consideration of the adverse inference may assist in creating an issue of fact. Byrnie, 243 F3d at 110. Plaintiff has failed to establish any evidence upon which reasonable minds could differ as to whether Defendants had actual or constructive notice of the damage.

As discussed above, the adverse inference is not, in and of itself, substantive evidence which could create an issue of material fact sufficient to defeat summary disposition. See Meli, 37 Mich App at 518; Maiden, 461 Mich at 120. Without affirmative evidence supporting Plaintiff's claims, summary disposition is appropriate. Plaintiff has failed to establish sufficient evidence, even if the Court considered an inference that the videotape may contain something adverse to Defendants, to create even a borderline case that the pump had been damaged a sufficient amount of time that Defendants should have known of the dangerous condition, or that the damage to the pump was of such a character that Defendants should have been on notice of the damage. Thus, regardless of whether some adverse inference is considered at summary disposition, Plaintiff has not created an issue of material fact sufficient to defeat summary

disposition on the question of constructive notice. The Oakland County Circuit Court was correct in granting Defendants summary disposition, and the Court of Appeals properly affirmed.

1. Constructive notice may be appropriately decided as a question of law where, as here, Plaintiff has not provided sufficient evidence to create a genuine issue of material fact.

Plaintiff argues that the issue of constructive notice is reserved for the trier of fact, and is not appropriate for the courts to determine on summary disposition. See Application at 18-19. All cases, however, require an initial showing of evidence sufficient to create a genuine issue of material fact before the claims may be submitted to a jury. If the evidence is so one-sided that reasonable minds could not differ as whether Plaintiff has failed to prove his element of the claims, the court is required to grant summary disposition. West v General Motors Corp, 469 Mich 177, 183, 665 NW2d 468 (2003). Thus, neither the circuit court nor the Court of Appeals erred in granting the Defendants summary disposition, because Plaintiff has completely failed to establish sufficient facts to create a genuine issue of material fact.

To establish a question of fact of constructive notice sufficient to send the issue to the jury, Plaintiff must present enough evidence to "take the case out of the realm of conjecture" and place it into "the field of legitimate inferences from established facts." Whitmore v Sears, Roebuck & Co, 89 Mich App 3, 9, 279 NW2d 318 (1979). As this Court stated in Skinner v Square D Co, "[A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be 2 or more plausible explanations as to how an even happened or what produced it; yet, if the evidence is without selective application to any 1 of them, they remain conjectures only." Skinner v Square D Co, 445 Mich 153, 164-165, 516 NW2d 475 (1994) (discussing proof required to establish a question of fact as to the element of causation in a negligence claim).

Thus, Plaintiff has the burden of setting forth specific facts to support his claim of constructive notice: either facts sufficient to demonstrate the character of the defect was such, or that the defect existed for a considerable time, that the inference can be made that Defendants should have been on notice of the damage. See Clark v Kmart, 465 Mich 416, 418-419; 634 NW2d 347 (2001). The scant facts that Plaintiff has set forth cannot lead to reasonable inferences in favor of his claims; indeed, only conjecture and speculation exist as to whether the Defendants should have been on notice of the damage to the gasoline pump.

2. Plaintiff has failed to establish a question of material fact exists on the issue of whether the character of the defect was sufficient to put Defendants on notice of the dangerous condition.

Plaintiff claims that the character of the defect alone was such that Defendants should have been on notice of its existence.[5] See Application at 9-10. As Defendants have demonstrated, however, Plaintiff has not established sufficient evidence that the character of the defect – the fact that the regular-unleaded hose was lying on the ground and the Defendants' employees had a duty to monitor the pumps for drive-offs – was such that Defendants would have been on notice of the damage.

Even assuming Plaintiff's argument that Defendants' employees had a duty to constantly[6] monitor the pumps and should have seen the regular-unleaded hose lying on the ground, Plaintiff has presented no evidence that the hose was lying in a position that was visible from inside the store where Defendants' employees were operating the cash registers. Moreover, Plaintiff has presented no evidence that the presence of the hose lying on the ground, alone, could have

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[5] Defendants adhere to their position that Plaintiff has waived this argument on appeal because he did raise this issue before the circuit court in response to Defendants' summary disposition motion.

[6] Defendants dispute that the employees' duties required "constant" monitoring of the pumps.

indicated that the pump had been damaged. Defendants have demonstrated[7] that even though the regular unleaded hose was lying on the ground, it would not have alerted Defendants to a potential problem with the pump because the pump was shut off.[8] Thus, Plaintiff has presented no evidence that the character of the defect was such that Defendants should have been on notice of the damage.

3. Plaintiff has failed to establish a question of fact that the one-cent sale should have put Defendants on notice of the dangerous condition.

Plaintiff also argues that the existence of the one-cent sale approximately three minutes before Plaintiff's accident should have put Defendants on notice that something "was amiss" with pump number twelve. See Application at 17-18. Again, Plaintiff has failed to establish specific facts that this one-cent sale would have alerted Defendants to any such problem with the pump.[9] Plaintiff relies only on the affidavit of his purported expert, Mr. Greene, to support this claim. See Application at 17-18; Greene Affidavit, Ex. F. Mr. Greene's testimony, however, is insufficient to establish that a one-cent sale would have alerted Defendants to a problem because his conclusions are based on conjecture, not actual facts.

Mr. Greene's affidavit testimony is clear that he did not inspect the kind of gasoline pumps located at the Defendants' station, or the actual gasoline pumps at Defendants' station. Mr. Greene also did not inspect the cash registers at Defendants' station. See Greene Affidavit,

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[7] In support of their arguments, Defendants rely on the more detailed facts and argument presented in their Response to Plaintiff-Appellants Application for Leave, and will not repeat those entire arguments here.

[8] Ms. Salsbury testified that the presence of a hose on the ground, with the gas pump turned on, and no vehicle present at the pump is what indicates to the employees that a drive-off has occurred. Salsbury Deposition at 98-100, Ex. D. It is not simply the mere presence of the hose lying on the ground.

[9] Again, in support of their arguments, Defendants rely on the more detailed facts and argument presented in their Response to Plaintiff-Appellants Application for Leave, and will not repeat those entire arguments here.

¶5. His conclusion that Defendants would have been alerted to a one-cent sale is pure conjecture, based on Mr. Greene's purported knowledge of how some gasoline pumps operate – not the actual, established facts of how the Defendants' pumps and registers operate. Skinner, 445 Mich at 173 ("...there must be facts in evidence to support the opinion testimony of an expert"). This type of conjecture is insufficient evidence to establish a question of material fact on summary disposition. Karbel v Comerica Bank, 247 Mich App 90, 107, 635 NW2d 69 (2001). Indeed, Mr. Pemberton, the Defendants station manager, testified without dispute that the register would not specifically identify only a one-cent sale occurred. See Pemberton Affidavit, ¶ 3, 5, 6, Ex. G.

Assuming that Mr. Greene's testimony is true -- that Defendants would have known immediately that a one-cent sale occurred -- Plaintiff has not provided facts supporting his conclusion that this one-cent sale would have then alerted Defendants to an actual problem with the pump. Indeed, the evidence presented by the Defendants completely dispels this conclusion. Mr. Pemberton testified that several normal scenarios could yield a one-cent sale. See Pemberton Affidavit, ¶4, Ex. G. Thus, even if Defendants were alerted that a one-cent sale occurred, Plaintiff has failed to present any facts that this sale would have put Defendants on constructive notice that the pump was damaged.

4. Plaintiff has failed to present specific facts to establish a question of material fact that the defect existed for a considerable time.

Plaintiff has also failed to set forth any evidence to create an issue of fact as to the second test of constructive notice. Plaintiff has not demonstrated any evidence that the damage to the pump existed for a ***considerable*** amount of time such that Defendants should have been on notice of the damage. See Clark, 465 Mich at 418-419.

It appears from the cash register tapes of sales from the day of Plaintiff's injury that the damage to the pump occurred, at most, eight minutes[10] prior to Plaintiff's arrival at the station. The cash register tapes show that at 5:12:12 p.m., six to eight minutes prior to Plaintiff's arrival, the pump recorded a regular unleaded sale of $25.68. The pump apparently functioned without incident at the time of this sale. The following sale was the $0.01 sale for special gasoline, occurring at approximately 5:15:17 p.m. Then, Plaintiff's sale of special gasoline in the amount of $0.23 occurred at 5:18:42 p.m. See Receipts, Ex. E. From these facts, one could reasonably infer that the damage to the pump did not occur prior to the 5:12:12 p.m. sale of regular gasoline. It is mere speculation and conjecture, however, as to when during those eight minutes the damage actually occurred. From these facts, it is equally possible that the damage occurred between the $25.68 sale and the one-cent sale, or at the time of the one-cent sale, or, given the testimony that several normal events could lead to a one-cent sale, it is also possible that the damage occurred after the one-cent sale. Accordingly, when the actual damage to the pump occurred is complete speculation, and cannot create a genuine issue of material fact that the damage existed a considerable amount of time to put the Defendants on notice.

5. Applying an adverse inference to the facts of this case is not sufficient to create a genuine issue of material fact.

Although an adverse inference should not be applied in this case given the lack of evidence corroborating what the video may have contained, applying the inference would still not create a genuine issue of material fact sufficient to save Plaintiff from summary disposition. As discussed above, an adverse inference is not itself affirmative evidence that may be relied on in support of a summary disposition motion. See Weber, 328 Mich at 426; Department of Social

[10] A discrepancy exists between the two sets of cash register tapes. One set shows Plaintiff's $0.23 sale occurred at 5:18:42 p.m. and the other set shows the sale occurred at 5:20:28 p.m.

Services, 177 Mich App at 445; Maszczenski, 212 Md at 355; Battocchi, 581 A2d at 765. Coupled with Plaintiff's lack of other substantive evidence supporting constructive notice, summary disposition is appropriate.

The only inference that could even questionably be drawn from the evidence presented is that the videotape may have shown the time the damage to the pump occurred, and the character of the damage to the pump after the damage occurred. Even if it could be inferred that the videotape showed either of these things, without other affirmative evidence by Plaintiff, and in the face of the uncontroverted evidence by the Defendants diffusing these inferences, an issue of material fact does not arise. See King, 329 Mich at 594 (an inference loses force when contrary evidence is presented).

Plaintiff has not demonstrated any other facts which support more than conjecture or speculation that Defendants should have had notice of the damage, and the application of an adverse inference here cannot assist him. Only in borderline cases, where the specific facts presented by Plaintiff in support of his claims nearly create an issue of fact, can the application of an adverse inference potentially affect whether a genuine issue of material fact is found. See eg Byrnie, 243 F3d at 110.

Moreover, Defendants have produced uncontroverted affirmative evidence disputing the inference that the video was adverse to Defendants. Ms. Salsbury testified that she viewed the videotape subsequent to the Plaintiff's accident, and it did not show the damage to the pump because the camera view was blocked by the height of the pump itself. See Salsbury Dep at 105, Ex. D. Plaintiff has not produced any evidence demonstrating otherwise, such as other security video demonstrating the view of the pump should not have been blocked on the missing

videotape. Thus, even applying an adverse inference, Plaintiff has failed to present sufficient evidence to defeat summary disposition.

IV. CONCLUSION

The Oakland County Circuit Court properly granted Defendants summary disposition on the issue of constructive notice, and the Court of Appeals properly affirmed that decision. Plaintiff has failed to present any evidence to create a genuine issue of material fact as to whether Defendants should have been on notice of the damage to the gasoline pump. Given Plaintiff's insufficient showing of facts which could corroborate the adverse inference he requests the court draw, the adverse inference that Plaintiff was awarded by the trial court as a spoliation sanction should not be applied in support of Plaintiff's effort to create a genuine issue of material fact.

Regardless of whether the Court applies the adverse inference in determining whether summary disposition is appropriate, however, Plaintiff still cannot defeat summary disposition. The adverse inference, in and of itself, is not substantive evidence that may be relied on to support Plaintiff's claims. Thus, without providing any other evidence which would tend to create a genuine issue of material fact, the adverse inference cannot assist Plaintiff in defeating summary disposition. Accordingly, there is no need for this Court to grant Plaintiff leave to appeal the lower courts' grant of summary disposition in favor of Defendants.

Respectfully submitted,

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Dated: October 25, 2006